No. 3794

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STERLING TIRE CORPORATION (a corporation),
Plaintiff in Error,

vs.

JOHN M. SULLIVAN, as Receiver of an alleged co-partnership consisting of E. E. GERLINGER and G. R. HICKOK and trading under the fictitious name of STERLING TIRE COMPANY OF CALIFORNIA, and E. E GERLINGER, Intervenor,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

McNAIR & STOKER,
Attorneys for Plaintiff in Error.

No. 3794

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STERLING TIRE CORPORATION (a corporation),
Plaintiff in Error,

vs.

JOHN M. SULLIVAN, as Receiver of an alleged co-partnership consisting of E. E. GERLINGER and G. R. HICKOK and trading under the fictitious name of STERLING TIRE COMPANY OF CALIFORNIA, and E. E GERLINGER, Intervenor,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This is an action in replevin brought by plaintiff in error to recover the possession of certain automobile tires and tubes seized by defendant in error Sullivan while acting as receiver under appointment by the Superior Court of the State of California, in and for the City and County of San Francisco.

An action was commenced in said Superior Court by the above named intervenor, E. E. Gerlinger, against one G. R. Hickok, claiming that Gerlinger and Hickok were partners trading under the fictitious name of Sterling Tire Company of California; that Hickok had refused to recognize Gerlinger as a partner; that the partnership assets consisted of a contract between said partnership and the Sterling Tire Corporation, plaintiff in error herein, under which the partnership had the right to sell automobile tires and tubes manufactured by plaintiff in error. In his said action Gerlinger asked for a dissolution of the alleged copartnership, for an accounting, and for the appointment of a receiver to take possession of the partnership assets and to conduct the partnership business.

The State Court appointed defendant in error Sullivan receiver for the alleged copartnership as prayed in said complaint. The order appointing the receiver was made *ex parte*. The receiver immediately seized the property involved in this action, consisting of automobile tires and tubes of the value of $100,000, as being assets of the alleged copartnership.

About one month thereafter plaintiff in error commenced the present action in replevin and took all of said property from the possession of the receiver, first obtaining from the Court appointing the receiver an order permitting such replevin action to be brought.

At the time the receiver seized the property involved it was in San Francisco in possession of plaintiff in error's agent, under the following circumstances: Previous to April, 1920, the property had been delivered by plaintiff in error to one Warren of San Francisco for sale. Differences arose between Warren and plaintiff in error, and in April, 1920, plaintiff in error sent its second vice-president, E. R. Northrop, to San Francisco to terminate the existing arrangements and procure another representative. Northrop made an adjustment with Warren, accepted from Warren the return of the property, being the automobile tires and tubes replevined in this action, and placed the property with a custodian pending the selection of a new representative for the Pacific Coast to handle plaintiff in error's line of goods. In seeking a new representative Northrop met E. E. Gerlinger, and offered the agency to him; but the proposition was too big for Gerlinger's resources. Gerlinger introduced Northrop to G. R. Hickok. Negotiations between Northrop, Hickok and Gerlinger resulted in the formulation of a contract which provided, in effect, for the consignment of these and other tires and tubes by plaintiff in error to the Sterling Tire Company of California, for sale on stated terms and conditions. This contract was signed by Hickok on behalf of the Sterling Tire Company of California, and Northrop immediately forwarded it to plaintiff in error at its office in New Jersey, for approval.

The proposed contract was not accepted by plaintiff in error, and no contract was ever entered into between it and the Sterling Tire Company of California. It was while the proposed contract was in New Jersey under consideration by plaintiff in error that Gerlinger brought his suit and procured the appointment of defendant in error Sullivan as receiver, and the receiver seized the property while plaintiff in error had the proposed contract under consideration.

Hickok answered Gerlinger's complaint, denying any copartnership relation, and alleged that the Sterling Tire Company of California was the fictitious name of the National Finance Company, a corporation in which he (Hickok) was interested; and further alleged that the Sterling Tire Company of California merely held possession of the tires and tubes as custodian for plaintiff in error, and that no contract of any kind was consummated between plaintiff in error and the Sterling Tire Company of California.

Plaintiff in error was not made a party to said action in the State Court, never asked leave to become a party, and never became a party; but on May 18, 1920, approximately one week after the receiver had seized plaintiff in error's property, Mr. Howard Harron, attorney for Hickok, advised the State Court that he had been authorized to act for plaintiff in error, and requested said Court to require the plaintiff in that action to give a bond

that would indemnify plaintiff in error as well as the defendant Hickok. This request was opposed by the attorney for Gerlinger. The State Court acceded to Mr. Harron's request, and thereupon a bond in the sum of $5000 was given by Gerlinger to indemnify not only the defendant Hickok but plaintiff in error as well against such damages as they might sustain by reason of the appointment of the receiver if his appointment was wrongfully procured.

Afterwards, and on May 24, 1920, the receiver served a notice on the respective attorneys for Gerlinger and Hickok, but not on the plaintiff in error, that on May 27th he would move the State Court for an order directing his course and conduct of carrying on the business of the alleged copartnership. When said motion came on for hearing on May 27th, George E. Stoker appeared specially and advised the Court that he had just been retained as counsel for plaintiff in error, and requested that no order be made respecting the sale or disposition of these tires seized by the receiver until he could communicate with plaintiff in error and ascertain the facts of the case and the wishes of his client, stating to the Court that a sale of the property by the receiver might be prejudicial to the business and standing of plaintiff in error. Thereupon an order was agreed upon, appearing at pages 40-43 of the Transcript, the purpose and effect of which was to give plaintiff in error until

June 10, 1920, to determine what course it should pursue. Plaintiff in error concluded to avail itself of the remedy of replevin, and to this end to invoke the jurisdiction of the United States District Court. This action was commenced on June 11, 1920. Plaintiff in error gave a replevin bond in the penal sum of $200,000, in favor of E. E. Gerlinger as well as the receiver. The property was taken by the marshal and subsequently delivered by him to plaintiff in error, who now has it. Subsequently, and on April 15, 1921, without any notice to plaintiff in error of its intention in that regard, on motion of the receiver, the State Court made an order settling the receiver's account in the sum of $2,676.67, and ordering that said sum be made payable "out of the fund or property which came into the hands, possession and control of said receiver under and by virtue of his appointment and authority as such receiver, and that said receiver have a lien on said fund or property for his compensation and fees" (Tr. p. 46).

Within one week after making the foregoing order the State Court gave its judgment, in the case of Gerlinger against Hickok, in favor of the defendant therein, expressly finding that no partnership was entered into between said parties as alleged in Gerlinger's complaint, or at all.

The result of the judgment of the State Court in the case of *Gerlinger v. Hickok* left little for determination in the replevin action in the Court below.

The finding of the State Court that no partnership existed between Gerlinger and Hickok, contrary to the allegations of Gerlinger's complaint, was equivalent to a finding that the appointment of the receiver was wrongful and that the seizure by the receiver of the property replevined was wrongful. The evidence offered at the trial of the replevin action proved, and the fact appears by the bill of exceptions, that at the time of the commmencement of the replevin action plaintiff in error was the owner and entitled to the possession of the property replevined. Under these circumstances plaintiff in error requested the trial Court to give judgment in its favor for the recovery of possession of the property, free of any charge against it on behalf of the receiver, and for damages for its detention from May 10, 1920, to June 16, 1920, equivalent to legal interest for that period of time on the agreed value of the property, to wit, $100,000 (Tr. p. 50).

The trial Court granted this request in part only. It ordered judgment in favor of plaintiff in error for the return of the property, but subject to the payment by plaintiff in error of the sum of $2,676.67 adjudged a lien thereon by the State Court in favor of the receiver, and without damages for its detention, and without costs (Tr. pp. 28-29, 50).

The theory upon which the trial Court gave its judgment was that plaintiff in error submitted its property to the jurisdiction of the State Court and to the rights of the receiver (1) by asking and re-

ceiving at the hands of that Court a bond for indemnity against damages it might sustain by reason of the acts of the receiver if the receiver's appointment was wrongful (Tr. pp. 36-37), and (2) by participating in the proceedings in the State Court resulting in the order of that Court dated May 28, 1920 (Tr. pp. 40-43), to the extent disclosed by said order. The trial Court said:

> "Of course, had you simply ignored the Superior Court, which you had the right, as a nonresident, to do, and had come into this Court and sued out your action in replevin, your case would have been entirely free. * * * The recognition was by going in and participating. You were not called on to do that. If you saw fit to seek the jurisdiction of another tribunal, you had a right to come in here and bring an action for replevin and take your property, and not have gone into that Court at all. Of course, you did not subject yourself to the general jurisdiction of that Court. * * * I do not see how I can avoid the results of what occurred in the State Court. * * * All I am holding is that upon the case as presented here by the mutual statements of counsel, and as to which there seems to be no question in the main, that while you are entitled to judgment here, you will take it subject to the requirement to pay this demand that is shown to have been allowed by the State Court as against the property. * * * That, of course, I have no jurisdiction to revise. I cannot inquire into the value of the receiver's services, or the services of his attorney. * * * You are entitled to the return of the property, or its value, because it is determined that the title and right of possession were in you. As

the action is against the mere arm of a Court of sister jurisdiction, you are not entitled to anything in the nature of damages for the detention."

Assignment of Errors.

Plaintiff in error complains of and assigns as error:

First. The ruling of the trial Court that judgment should be entered in favor of plaintiff in error for the return of the property replevined, or its value, subject to the lien attempted to be established against the property by the order of the State Court of April 15, 1921, notwithstanding plaintiff in error's request that judgment be ordered in its favor for the recovery of the property free and clear of any charge against it on behalf of the receiver.

Second. The ruling of the trial Court that judgment should be entered in favor of plaintiff in error for the return of the property replevined, or its value, but without damages for its detention, and without costs, notwithstanding plaintiff in error's request that the judgment include damages for the detention from May 10, 1920, to June 16, 1920, equivalent to legal interest for that period of time on the agreed value ($100,000) of the property.

Argument.

I.

The first error assigned involves the effect of the order of the State Court of April 15, 1921 (Tr. pp.

45-46), attempting to charge a lien against the property replevined for the payment of the expenses of the receivership, and the extent to which that order was controlling on the Court below in the determination of the replevin action.

On May 24, 1920, the State Court made an order permitting this action to be brought against the receiver and the property to be taken from the receiver's possession (Tr. pp. 43-44). This action was brought on June 11, 1920, and the property taken from the receiver on June 16, 1920, and delivered to plaintiff in error, who now has it. Ten months thereafter, and while the replevin action was still pending, and without plaintiff in error having an opportunity to be heard, the State Court made its order of April 15, 1921. The Court below was of the opinion that it was bound by that order, and that, notwithstanding the evidence showed without contradiction that plaintiff in error was entitled to the possession of the property on the date the replevin action was commenced, any judgment in favor of plaintiff in error for the return of the property, or its value, would have to be subject to said order of the State Court.

DUE PROCESS NECESSARY TO SUSTAIN A JUDGMENT.

That the owner cannot be divested of his property, or of his right to retain its possession, except by an order made in a proceeding to which he was a party

and in which he had been given an opportunity to be heard, is unquestioned and unquestionable. To take it in any other manner would be to deprive the owner of his property without due process of law, contrary to section 13 of article I of the Constitution of California and contrary to article V and section 1 of article XIV of the Constitution of the United States.

Upon the same principle no Court has the power to direct its receiver to seize property of a person not a party to the record; and if the receiver assumes to take property of a stranger to the record he will be a trespasser.

34 Cyc. 190, 410.

To the extent that the receiver's seizure embraces property of a stranger to the record an exception is created to the general rule that the court's jurisdiction of the *res* is acquired by a seizure. Jurisdiction cannot be obtained except by a lawful seizure.

15 C. J. 802, note 97.

And even where jurisdiction is acquired of the *res* by a lawful seizure, in proceedings *quasi in rem* it is imperative that citation, actual or constructive, be made upon the owner in order for the Court to lawfully exercise the jurisdiction so acquired.

Freeman v. Alderson, 119 U. S. 185; 30 L. Ed. 372.

The property here involved, and which the receiver seized in the State Court action of *Gerlinger*

v. Hickok, was not the property of either of the parties to that action, nor was either of said parties at said time in the possession of said property or entitled to its possession. It was seized by the receiver upon the theory, and under an order consonant with such theory, that it was then in the possession of a co-partnership, composed of Gerlinger and Hickok, and known as the Sterling Tire Company of California, and that such co-partnership was entitled to its possession. The State Court, in the action referred to, ultimately found that no such co-partnership existed. These facts are conceded.

The conclusion is inescapable that when the receiver seized the property he was a trespasser. He took property not in the possession of or belonging to the persons over whose estate he was appointed. Indeed, he was not receiver of the estate of anybody. The partnership for which he was appointed was wholly imaginary.

The property seized by the receiver belonged to plaintiff in error and at that time was in the possession of plaintiff in error's agent. Plaintiff in error was not a party to the action in which the receiver was appointed, and no attempt was made to make it a party. These facts will not be disputed.

The State Court made an order assessing the expenses of the receivership against the property of plaintiff in error. Plaintiff in error was not heard and was given no opportunity to be heard when this order was made. These facts, also, will be conceded.

Upon such a state of facts, unaffected by other considerations, we believe all will agree that the order of the State Court would be absolutely void and subject to collateral attack.

ATTEMPTED JUSTIFICATION OF ORDER OF APRIL 15, 1921.

The receiver attempts to avoid these consequences by the argument that plaintiff in error "recognized" him and "recognized" his possession by certain acts of participation in the State Court proceedings.

These so-called acts of participation were (1) a request of the State Court by plaintiff in error that Gerlinger, plaintiff in the State Court case, be required to give a bond to indemnify plaintiff in error against damages that it might sustain by reason of the receiver's acts if he were wrongfully appointed, in pursuance of which request such a bond was furnished (Tr. pp. 36-37), and (2) a special appearance at the hearing of the receiver's motion for an order directing him in his duties, and approval of the order made by the State Court in response to said motion (Tr. pp. 38-43).

The theory upon which the trial Court gave its judgment, here sought to be reviewed, was that inasmuch as plaintiff in error "recognized" the receiver and his possession, in the fashion indicated, the State Court acquired the right, which otherwise it did not possess, to charge the expenses of the re-

ceivership against plaintiff in error's property, as it attempted to do by its order of April 15, 1921, and that the Court below could not revise that order, but was bound by it.

Plaintiff in error maintains that the contentions of the receiver are unsound and the conclusions of the trial Court are erroneous, for the following reasons:

First. It was impossible for plaintiff in error, not being a party to the State Court proceedings and the receivership not being for its benefit or the benefit of its property, to so recognize the receiver or his possession as to give the State Court the right to charge the expenses of the receivership against that property. Nothing short of plaintiff in error's express consent to the making of an order of that kind could justify the making of such an order under these circumstances.

Second. Plaintiff in error, by its participation in the State Court proceedings, challenged the receiver's possession instead of recognizing his possession as rightful.

Third. If such participation was a recognition of the rightfulness of the receiver's possession, plaintiff in error was entitled to an opportunity to be heard before any valid order could be made imposing burdens upon its property; and since the order of the State Court of April 15, 1921, was void because made without notice, it was subject to collateral attack in the replevin action, even if the

State Court had the power, otherwise, to make such order.

Fourth. Since the State Court granted permission for the property to be taken from the receiver's possession in a replevin action in another tribunal, after the property was so taken the State Court was divested of all power to make any order affecting the property except upon condition of it being subsequently returned to the receiver pursuant to a judgment in the receiver's favor in the replevin suit.

Let us consider these contentions in their order.

RULE OF ESTOPPEL NOT APPLICABLE TO PLAINTIFF IN ERROR.

We concede that a *defendant* in an action, by various acts of participation therein, or even through failure to act in some particular fashion, will be estopped from afterwards objecting to the receiver's appointment. Cases illustrative of this rule may be found in *34 Cyc.*, page 162.

But this rule has no application to a *stranger* to the record, who has no interest in the controversy and against whom no relief is sought, whose property has been wrongfully taken and to whom the receivership can be of not benefit. No authority can be cited wherein it has been held that the rule of estoppel is applicable to him. As is said by the Supreme Court of Illinois, in the case of *Highley v. Deane,* 168 Ill. 272; 48 N. E. 52:

> "And the courts almost uniformly hold in the case of intervenors that, where the receivership is not requested by them, and they obtain no benefit from it, they or their property are not liable for any of the costs or expenses."

A receivership is a provisional remedy, a collateral proceeding adapted to meet a particular exigency in connection with a regular action. The proceedings imply the existence of a right which one party is entitled to have enforced against another, and the purpose is to conserve the property until the rights of the respective parties have been adjudicated. The principles of law governing receiverships, and the applicability of the rule of estoppel, are based upon such a relationship of parties. There can be no such application to a stranger, against whom no relief is sought.

The contention of the receiver is that plaintiff in error, by participating in the proceedings in the State Court in the manner disclosed, invoked against itself this rule of estoppel, and to the extent of depriving it of the right to object to having its property charged with the expenses of the receivership. Analyze the receiver's contention in whatever manner we may, the result is, if the contention is correct, that plaintiff in error thereby consented that the expenses might be charged against its property. This is the inescapable result, because it must be conceded that the Court could lawfully charge the expenses to the property only if the receiver were rightfully in possession, and if plaintiff in error by

its participation recognized the rightfulness of the receiver's possession it could not afterwards be heard to say that the Court did not have the right to impose this burden upon the property. This, we submit, is carrying the doctrine of estoppel to an unheard of and unwarranted extent.

When it becomes thus obvious that a recognition of the rightfulness of the receiver's possession implies consent to charging the expenses of the receivership to the property, the absurdity of attributing recognition of the receiver's rightful possession to plaintiff in error's acts of participation is apparent. Consequences of this character might attach to a *party defendant* who thus participated, but we challenge defendants in error to cite any authority holding that a stranger to the record may be so penalized. Plaintiff in error was not a party to those proceedings. It could not benefit by the receivership. It could not recognize the rightfulness of the receiver's possession without admitting to be fact what as to it nobody alleged to be fact, namely, the existence of the co-partnership between Gerlinger and Hickok and such co-partnership's right to possession of the property. Plaintiff in error, not being a party to the action, had no issue tendered to it on those matters. Therefore it was not committed as to any such matter by its participation in the proceedings. It is our contention that plaintiff in error could participate in the proceedings in the State Court to any extent it pleased, so far as that

Court permitted, without the impairment of any of its rights, so long as it was not made a party and no relief was asked as against it; and this being true it cannot be held to have admitted that the receiver was rightfully in possession when in truth he was not rightfully in possession, and when his possession could not be made rightful.

We beg to quote somewhat at length from the case of *Tome v. King,* 64 Md. 166, in support of the argument that a stranger to a proceeding in which a receiver was appointed, who had no opportunity to be heard when the receiver was appointed and placed in charge, and who was not benefited by the receivership, even though he actively participated in the proceedings subsequent to the receiver's appointment, cannot be held to have so recognized the receivership as to justify an order assessing the expenses of the receivership against him or his property. While the facts of that case are not in all respects similar to the facts of the case at bar, yet we submit that the principles of equity and rules of law are applicable to the one case as pertinently as to the other. In the case at bar the recognition of the receiver by plaintiff in error was not as positive as by the trustee of the first mortgage bondholders in *Tome v. King.* That was a case to foreclose a second mortgage, and receivers were appointed. The first mortgagee was not made a defendant. Later, the trustee under the first mortgage intervened and participated in the proceedings. He even

requested the Court to ratify a sale of the property made by the receivers. This sale, however, the Court refused to approve. Subsequently the property was sold subject to the first mortgage. The amount realized was not sufficient to pay the expenses of the receivership, and the trial Court made an order attempting to collect the deficiency from the bondholders under the first mortgage. Said order provided that in the event of the failure of the first mortgage bondholders to pay this deficiency the trustee should "make sale, at public auction, of the said first mortgage bonded debt and security" for such purpose. In reversing this order the Supreme Court of Maryland said:

> "It is contended by the appellees that Tome, as the representative of the first mortgage bondholders, was a party to the proceedings, and that, therefore, the fund represented by him was not only liable to be decreed upon, but was liable for the commissions and disbursements that were allowed to the receivers and trustees. Whether this be so or not depends upon circumstances. It is certainly true, as a general rule, as contended by the appellees, that where a subsequent mortgagee or other incumbrancer files a bill for the purpose of ascertaining the extent of priorities, making a prior mortgagee a party, but without offering to redeem, the prior mortgagee may insist upon being dismissed with costs. But if such prior mortgagee or incumbrancer, instead of asking to be dismissed, consents to a sale and to take his principal and interest out of the proceeds, as he thereby adopts the suit and takes the benefit of it, he must contribute, in the event of a deficiency of the fund, to the costs of the suit and

expenses of the sale; and therefore such costs and expenses will be paid out of the fund, even though there may not be enough left to pay the prior incumbrancer his principal and interest. White v. Bishop of Peterborough, Jac. 402; 3 Dan'l Ch. Pr. 1530. But that is not this case. Here, as we have seen, the original bill was filed by the trustees in the second mortgage without making the first mortgagees or any of them parties. It was at the instance of the second mortgagees that the property was placed in the hands of receivers, and by so doing the right and power of the trustee in the first mortgage to take possession and operate the road, as authorized by that deed, was defeated; and as that was the effect of placing receivers on the property, the trustee in the first mortgage should have been made a party to the bill filed by the trustees for the second mortgage bondholders. Miltenberger v. R. R. Co., 106 U. S. 286, 306. But that was not done; and the receivers were appointed, and they took possession of the entire property, for the benefit of the second mortgage bondholders, without an opportunity on the part of the trustee for the first mortgage bondholders to be heard. It was not until some time after the receiver had taken possession of the property, and some portion of it had been sold, that Tome, as trustee, intervened by petition, and upon being admitted as a party defendant, filed his cross-bill, in which he prayed for a sale. In two of the efforts made to sell the property under interlocutory orders, he joined, but those efforts wholly failed. In the final decree for sale, the property was decreed to be sold subject to the first mortgage, and therefore the first mortgage bondholders were in no manner affected in their rights by that sale. The sale having been made subject to the first mortgage, in no event could the first mortgage bondholders participate in the dis-

tribution of the proceeds of that sale, even though such proceeds had greatly exceeded the second mortgage debt,—the sale only operating upon the equity of redemption covered by the second mortgage. Woodworth v. Blair, 112 U. S. 8.

"Seeing then that the receivers were appointed solely at the instance and for the benefit of the second mortgage bondholders, and that the trustees who sold the property were appointed to sell exclusively for the benefit of the same parties, and not for the benefit of the first mortgage bondholders, upon what principle is it that the first mortgage bondholders should be made to pay the commissions and expenses allowed, or any part of them, to such receivers and trustees? We must confess we are at a loss to understand how it can be done, upon any principle of justice or reason. None of the first mortgage debt has been realized by sale, and that incumbrance remains intact. It is said, however, that the property was purchased at the sale for the benefit of the holders of the first mortgage bonds, and that therefore they were benefited by the sale. But we do not perceive how that fact, supposing it to be true, can justify the charging those bondholders with the commissions and other expenses in question. The objects in filing the original bill were to have receivers appointed, and a sale of the property decreed, and that, too, without the consent or co-operation of the trustee of the first mortgage bondholders, and both objects of the suit were gratified strictly in conformity to the prayer of the bill. The property having been sold for the benefit of the second mortgage bondholders, it was a right of the first mortgage bondholders, or any one or more of them, to purchase in the equity of redemption, or if it had been sold to a stranger, they could have

purchased it from him as well; and by such purchase they rendered themselves liable for nothing more than the purchase money—certainly not for commissions and expenses to the receivers and trustees on an amount that still remains a charge upon the property, and subject to which they made the purchase. There is therefore no ground whatever for the attempted assessment and summary sequestration and sale of the whole first mortgage debt with its security, for the payment of the commissions and other amounts allowed by the decree. For any costs that may have been incurred by reason of the filing of the cross-bill by Tome, and for any proper proportion of the expenses incurred in the abortive efforts to sell the property for the common benefit of both sets of mortgage bondholders, Tome as trustee is chargeable, but not for the commissions and amounts to indemnify the receivers. If the fund in Court be not sufficient to afford adequate compensation and indemnity to the receivers, the parties at whose instance they were put upon the property should be required to provide the means of payment."

That a *stranger* to the record in a receivership proceeding does not admit the rightfulness of the receiver's appointment or possession by participating in the proceedings, as does a *party* to such an action, is recognized by the Supreme Court of California in the recent case of *Fidelity Savings & Loan Assoc. v. Citizens Trust & Savings Bank,* 62 Cal. Dec. 222. There the receiver seized property belonging to the plaintiff, a stranger. While the property was in the receiver's possession it yielded an income, which he also took and held. The owner

applied to the Court appointing the receiver for the restoration of the property, and the application was granted; but the owner did not apply for the restoration of the money collected by the receiver while the property was in his charge. For this money the owner sued the receiver in his individual capacity. In defense the receiver argued that the action could not be maintained because the owner had submitted the property to the jurisdiction of the Court appointing the receiver by appearing in that Court and obtaining relief as to a portion of the property. The Supreme Court of California refused to uphold the receiver's contention, saying:

> "When the wrongful taking took place the plaintiff had its option to proceed in either of two ways. It could treat the order as ineffectual to authorize the taking and void to that extent and sue in the state courts for the recovery of the possession of the property, or it could upon the same ground apply to the district court in which the bankruptcy proceeding was pending for an order in that proceeding restoring possession to it. It is true that it made such application to the district court for the restoration of the hotel property and it was given to it in accordance with its application, the court holding that the taking of the hotel by the receiver was without authority and that the trustee had no right to the possession thereof. It does not appear, however, that the plaintiff ever made any application to the district court or the referee for the return of the money obtained by the defendant as receiver from the operation of the hotel while it was in possession thereof. That relief was not included, so far as appears,

> in the application for the restoration of the hotel property, and it follows that the defendant did not in any manner waive its right to take either of the two courses above suggested by any submission to the jurisdiction of the court with respect to said money. It had the right therefore to resort to the ordinary action for damages for trespass in order to recover the money from the receiver."

On principle there is no difference between that case and the case at bar. Here, as there, consequences are claimed as the result of the owner's participation in the receivership proceedings, namely, conferring jurisdiction on the court over the property, a jurisdiction it would not otherwise possess. The contention might be well taken if the person participating were a party to the proceedings, against whom some relief was sought, and who had an interest in the subject matter of the litigation; but it is an extremely strained contention when applied to a stranger to the record, and if upheld would lead to incalculable injustice and wrong, as the case at bar distinctly exemplifies.

PLAINTIFF IN ERROR'S PARTICIPATION WAS HOSTILE TO THE RECEIVER'S POSSESSION.

Plaintiff in error's request relative to the bond was for some security from Gerlinger, the plaintiff in the State Court case, against damages it might sustain by reason of the receiver's acts if his ap-

pointment was wrongful. The bond given in compliance with this request merely furnished plaintiff in error additional protection against loss it might sustain by reason of the receiver's seizure. The receiver had already seized the property and had it in his possession when plaintiff in error made its request. The wrongful act had been already committed by the receiver. The bond requested and given was not one for the faithful performance of the receiver's duties, required to be given by the receiver. It was a bond required of the party on whose application the receiver was appointed, in accordance with section 566 of the Code of Civil Procedure of California, which is as follows:

> "No party, or attorney of a party, or person interested in an action, or related to any judge of the court by consanguinity or affinity within the third degree, can be appointed receiver therein without the written consent of the parties, filed with the clerk. If a receiver is appointed upon an ex parte application, the court, before making the order, must require from the applicant an undertaking with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; *and the court may, in its discretion, at any time after said appointment, require an additional undertaking.*"

In any such case it would seem to be the right of any person interested to bring to the Court's atten-

tion, after the appointment was made, notice of the fact that the bond given was defective or insufficient, so that the interests of all parties would be protected. Surely the defendant himself in such a case, by making such request, would not be estopped from afterwards claiming that the appointment was wrongful; and if that be true, it is not apparent why a stranger to the record, pursuing the same course, should be placed in a worse position.

When plaintiff in error asked security against the receiver's wrongful acts (and his seizure of this property was a wrongful act) its request cannot possibly be construed as an admission that those acts were rightful. Its request, if of any significance, was notice that it claimed the acts were wrongful.

The other act of participation by plaintiff in error in the proceedings in the State Court was a special appearance at the hearing of the receiver's motion for an order directing him in his duties, and approving the order of the State Court made as a result of that hearing (Tr. pp. 38-43). One of the purposes of said motion, as is apparent from its contents, was to obtain explicit directions as to the manner in which the business of the alleged (but non-existent) copartnership should be conducted,—in other words, how plaintiff in error's property should be sold. The record shows (Tr. pp. 39-40) that attorneys representing plaintiff in error were present at the hearing of said motion and requested the Court to make no order respecting the sale of

the property until they could communicate with their client and ascertain the facts and their client's wishes. The order made by the State Court on May 28, 1920 (Tr. pp. 40-43), shows distinctly that plaintiff in error did not thereby "recognize" the rightfulness of the receiver's possession, as it provided that no sale of any of the property should be made without plaintiff in error's consent prior to June 10, 1920, during which interim plaintiff in error was to advise with its counsel and determine in what manner it would assert its rights and protect its interests.

Of course, plaintiff in error "recognized" the receiver and his possession, as those were actualities nobody could deny; but that by its said acts it recognized the *rightfulness* of his appointment, or the *rightfulness* of his possession, is a conclusion contrary to the inherent character of the acts themselves.

And we must not lose sight of the fact that the sole justification of the order of the State Court of April 15, 1921, attempting to charge the expenses of the receivership against plaintiff in error's property, and the sole justification of the conditional judgment awarded plaintiff in error by the trial Court, was that plaintiff in error, by the acts referred to, recognized the rightfulness of the receiver's appointment and the rightfulness of his possession. Once conceding that plaintiff in error's

acts were not attended with such consequences, the trial Court had no alternative to giving judgment for the return of the property unconditionally.

IF RECEIVER'S POSSESSION WAS RIGHTFUL PLAINTIFF IN ERROR WAS ENTITLED TO NOTICE BEFORE ITS PROPERTY COULD BE CHARGED.

But what is the result if we concede that plaintiff in error by its said acts recognized the rightfulness of the receiver's possession?

Our answer is that the order of the State Court of April 15, 1921, attempting to charge the property with a lien for the expenses of the receivership was absolutely void, for the reason that plaintiff in error was given no opportunity to be heard when said order was made. If plaintiff in error's participation in the State Court action gave that Court jurisdiction over the property that it otherwise would not have had, plaintiff in error was entitled to notice of any proceeding in which such acquired jurisdiction was attempted to be exercised. If plaintiff in error's acts were attended with the consequences claimed by the receiver, they were also attended with the privileges accorded to any party to a proceeding and could not be ignored. On the other hand, if the receiver's possession was the result of his trespass, plaintiff in error's claim was hostile to the property or fund in his hands, and in that event plaintiff in error had no right to be heard on the

settlement of his account. (*Black v. Black,* 93 Fed. 346). The order of the State Court confirming his account and charging a lien against plaintiff in error's property without giving plaintiff in error an opportunity to be heard cannot be justified if at the same time it is contended that plaintiff in error by its acts recognized the receiver's possession as rightful. The positions are inconsistent.

It is not claimed on behalf of the receiver, nor indeed could it be with any merit, that plaintiff in error by its said acts made itself a party to the State Court action. It was not contemplated by anybody, either by Gerlinger or by Hickok or by the receiver or by the State Court itself, that plaintiff in error had subjected its person or its property to the jurisdiction of that Court. The case of Gerlinger v. Hickok proceeded to trial and judgment on the theory that plaintiff in error was a stranger to those proceedings. The Judge of the Court below recognized that to be the situation when he said:

> "Of course you did not subject yourself to the general jurisdiction of that Court."

By some inexplicable process of reasoning the theory seems to be that plaintiff in error waived the receiver's trespass and acknowledged his possession to be rightful without thereby making itself a party to the proceedings, and that because of such waiver and acknowledgment the State Court acquired power to impose burdens upon the property.

But if citation is required before a Court can exercise jurisdiction over property seized in proceedings *quasi in rem (Freeman v. Alderson,* 119 U. S. 185; 30 L. Ed. 372), and if a party is not bound by a judgment in a proceeding wherein he has no right or opportunity to control the defense, or to introduce or cross-examine witnesses, or to prosecute a writ of error *(Hale v. Finch,* 104 U. S. 261; 26 L. Ed. 732), by what authority can a Court charge the expenses of a receivership against the property of a *stranger* to the record? We venture the assertion that not a single precedent can be found to support an order made under such circumstances. Such an exercise of judicial authority would be directly in conflict with the due process clauses of the Constitutions of the United States and of the State of California. As the Supreme Court of California said in the case of *Fidelity Savings & Loan Assoc. v. Citizens Trust & Savings Bank,* 62 Cal. Dec. 222, before cited:

> "The real contention, and it is well taken, is that the seizure was not within the authority conferred by the order, that the property which it gave authority to take and hold was the property of the bankrupt; not that of third persons. The right of the plaintiff to keep possession of the hotel could not be divested, except by an order made in a proceeding to which it was a party and in which it had been given an opportunity to be heard. To take it in any other manner would be to deprive it of its property without due process of law, a thing forbid-

> den both by our constitution (art. I, sec. 13) and by the constitution of the United States (arts. V, XIV, sec. 1)."

Even if the State Court otherwise had the power to make the order assailed, still that order was void and subject to collateral attack for the reason that it was made without notice to plaintiff in error. Even if the case presented were stronger; even if plaintiff in error had been named a party defendant, and even if circumstances were disclosed showing equitable grounds for the appropriation of its property for the payment of the expenses of the receivership, still the order of April 15, 1921, would be subject to collateral attack in the replevin action, since there was an entire want of notice, and without notice the Court was without jurisdiction.

> "When a judgment is brought collaterally before the Court as evidence, it may be shown to be void upon its face by a want of notice to the person against whom judgment was entered."
>
> *Webster v. Reid,* 11 How. 437; 13 L. Ed. 761.

> "It is an equally well-settled rule in jurisprudence, that the jurisdiction of any Court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings."
>
> *Williamson v. Berry,* 49 U. S. 495, 540; 12 L. Ed. 1170, 1189.

And in *Guaranty Trust Co. v. Railroad Co.,* 139 U. S. 137; 35 L. Ed. 116, the Supreme Court of the

United States held a judgment void and subject to collateral attack where it appeared that there was a failure to make service of process by publication as required by the statute.

The trial Court observed that it could not inquire into the value of the receiver's services, or the services of his attorney. That is true. But the trial Court was not called upon to do anything of that kind. Plaintiff in error was not concerned with the amount the State Court allowed the receiver and his attorney. Its concern was with the attempt to make that allowance a lien against its property, and since the order of the State Court attempting to do this thing was void because it lacked jurisdiction of either the person or the property of plaintiff in error, it was the duty of the trial Court to so declare and to order judgment for plaintiff in error for the return of the property replevined free of any charge against it on behalf of the receiver.

EFFECT OF ORDER PERMITTING REPLEVIN ACTION TO BE BROUGHT.

The order of the State Court appointing the receiver directed him to "proceed immediately to take possession of the assets of said partnership of plaintiff and defendant and of said Sterling Tire Company of California" (Tr. p. 23). It did not direct him to take the property of third persons, and when he took plaintiff in error's property he was a trespasser.

Plaintiff in error then had the option to sue the receiver in his individual capacity for damages for trespass in order to recover the property from the receiver, or it could, the State Court permitting, bring replevin against the receiver in his official capacity. The second alternative was selected, and the requisite permission was granted by the State Court (Tr. pp. 43-44). Express permission was given to bring the action in the Federal Court. Pursuant to that permission this action was commenced on June 11, 1920, the property taken from the receiver and delivered to plaintiff in error. From that date the property ceased to be in the possession of the State Court; and when that Court granted permission to the Federal Court to entertain and exercise jurisdiction over the property in replevin proceedings, which implied a determination by the Federal Court of who was entitled to the possession of the property at the date of the commencement of such proceedings, plaintiff in error maintains that so long as the Federal Court retained and was attempting to exercise the jurisdiction it possessed the State Court was without power to give any judgment which would prevent the Federal Court from granting complete relief to the litigants before it.

To sustain an action of claim and delivery in California the plaintiff must have a right to the immediate and exclusive possession of the property sought to be recovered. *(Garcia v. Gunn,* 119 Cal. 315). The only issue before the Court below was

whether plaintiff in error or the receiver was entitled to the possession of this property on June 11, 1920, the date the action was begun, not on any date subsequent thereto.

The order of the State Court attempting to charge a lien against the property was not made until April 15, 1921, over ten months after the property had been taken from the receiver in the replevin action. There was no charge of any kind against the property when it was taken under the replevin writ. At that time no lien on behalf of the receiver was in existence.

Under these circumstances, we submit, if plaintiff in error was entitled to any relief at the hands of the trial Court it was entitled to a judgment for the property free and clear of any claim on behalf of the receiver. If the right to the immediate and exclusive possession was in plaintiff in error on June 11, 1920, it was entitled to an unconditional judgment for the property. If, on the other hand, the order of the State Court of April 15, 1921, was of any validity as against the property and the Federal Court was obliged to recognize it, it must be admitted that such validity was derived from an undeniable right of immediate and exclusive possession in the receiver on June 11, 1920. In that case the trial Court should have given judgment in favor of the receiver. Either judgment should have been for plaintiff in error without any condition or it should have been for the receiver.

That the judgment should have been for plaintiff in error unconditionally is obvious from the fact that the only question before the trial Court was the right of possession on June 11, 1920, and on that date no charge against the property on behalf of the receiver was in existence; but we submit that the same conclusion results from the granting of leave by the State Court to bring this replevin action against its receiver. It is our contention that after the State Court granted permission for a replevin action to be brought against its receiver in the Federal Court, and after such an action was commenced and the jurisdiction of the Federal Court invoked, the State Court was without power, under the rule of comity between courts, to make any order concerning the property that would in the slightest degree limit the scope of any judgment the Federal Court might subsequently give, and which it could give pursuant to the State Court's order permitting the action to be brought. Or, to view the proposition from the other side, if the Federal Court was bound to recognize the order of the State Court of April 15, 1921, it should not have entertained jurisdiction of the cause at all, but should have ordered a dismissal.

If the State Court, through its receiver, was rightfully in possession of this property it could not be compelled to surrender that possession; but there was nothing to prevent it from surrendering such possession voluntarily and permitting another Court

of concurrent jurisdiction to exercise dominion over the property. That is exactly what the State Court did; and when the jurisdiction of the Federal Court was invoked under these circumstances it became the right and duty of that Court to fully perform and exhaust its jurisdiction and to decide every issue in the case. It is our contention that the effect of the State Court's permission to have the property taken in replevin proceedings in the Federal Court was to place the Federal Court in the position of having been the first to acquire jurisdiction, and being in such position it should have exercised that jurisdiction without regard to any subsequent attempt of the State Court to hinder or limit its authority. In proceeding on that theory the Federal Court would not have violated the rule of comity between the Federal and State Courts; but the State Court did violate that rule when it made its order of April 15, 1921, and for that reason said order should have been ignored by the Federal Court.

Under these circumstances a determination of the rights of the parties in the replevin action regardless of the State Court's order would not be a collateral attack on that order. And that, we submit, is the conclusion to which we are forced. The Federal Court was in a position to award plaintiff in error full relief, and it should have done so. The Federal Court was not called upon to revise the State Court's order. It should have ignored that order. It had the right and the power to adjudicate un-

affected by that order and to enforce its judgment regardless of that order.

The case of *James Freeman Brown Co. v. Harris,* 139 Fed. 105, is not unlike the case at bar. In that case plaintiff brought replevin and took its property from the defendant, who, as receiver in a State Court action, had seized the property. The replevin action was brought after leave to do so was granted by the State Court, just as in the case at bar. The lower Court found for the defendant, stating:

> "It may be that upon the hearing the plaintiff may be able to assert an undoubted right to possession of the goods. The case before me does not enable me to form any opinion on that point. All that I decide and all that I can decide, is that the goods having been left in possession of the Fairmont Mills, in circumstances which have given rise to claims adverse to the plaintiff, and having come into the hands of a receiver of a court of competent jurisdiction, who holds for the benefit of all concerned, and it appearing that such adverse claimants are proceeding to assert their rights in the state court, this court, from consideration of comity, ought not to interfere with such possession. The parties claiming adversely are not before it, and, without hearing them, it is impossible to say that the plaintiff has an unquestionable right to possession."

The Circuit Court of Appeals refused to approve this position, and said:

> "We fully appreciate the desire of the learned judge at the trial in this case to observe the comity which exists between the federal and

> state courts, and which should, at all times, be carefully guarded; but, with due deference to him, we are of opinion that, after the state court (in which the original case was pending) had signed an order authorizing the plaintiff to bring suit to enforce whatever right he claimed to the property in question against the receiver, 'in any court of competent jurisdiction', it was no invasion of the rule of comity to bring the action in the Circuit Court of the United States, since it fully appears by the pleadings that jurisdictional requirements, both as to parties and value of property in controversy, exist."

The Circuit Court of Appeals, after quoting from *Porter v. Sabin,* 149 U. S. 479; 37 L. Ed. 815, to the effect that it is for the Court appointing the receiver to decide whether it will determine for itself all claims against the receiver, or will allow them to be litigated elsewhere, concluded as follows:

> "We think that the order of the state court was ample to authorize the plaintiff to bring suit against the receiver in any forum, either state or national, having jurisdiction, for its terms are that the petitioner have leave to bring suit, 'in any court of competent jurisdiction against the receiver of said mills, to enforce its said contract and to settle and determine the rights of the parties thereunder', and we do not agree with the contention of the defendant that this meant only that the scope of the suit should be limited to a construction of the contract. The authority was to determine the rights of the parties under the contract. The right that plaintiff claimed was the ownership of the property, and this was the issue raised by the pleadings. The plaintiff and defendant submitted an agreed

> statement of facts in this case, upon which the presiding judge should have rendered a decision; but instead of determining the case upon a consideration of its merits, he proceeded upon an erroneous idea of comity, and still entered a judgment which is, in our opinion, final and conclusive. If the comity of jurisdiction forbade the entertainment of the action by the Circuit Court, the same should have been dismissed without prejudice, thus leaving the plaintiff to pursue his remedy before some other proper tribunal. But it is clear to us that the plaintiff had full authority under the terms of the order of the state court (it appearing that the necessary jurisdictional requirements existed) to bring suit in the Circuit Court for the possession of the property described, and that, upon the trial, the case should have been determined on its merits."

In the case at bar the order granting permission to sue the receiver (Tr. pp. 43-44) expressly authorized the action to be brought in the Federal Court, and it expressly authorized a replevin action to be brought, or any other form of action, "to determine the right of ownership or possession of any or all of the property seized and now possessed by said receiver". This is a more definite and comprehensive authority than the one considered by the Circuit Court of Appeals in the case from which we have just quoted. If in that case it was not only the right but the duty of the Court, by virtue of the authority contained in the order permitting the suit, to determine the case on its merits, it was the right and duty of the Court below to do likewise.

The right and duty arose from the authority granted by the Court which appointed the receiver. After such authority had been granted, and while it remained unrevoked, we submit that the Court entertaining jurisdiction of the cause could not be limited in the exercise of its powers within the scope of that authority.

In the case at bar the Court below was authorized to determine who was entitled to the possession of this property on June 11, 1920, the date of the commencement of the action. That authority was never revoked. The Court found that plaintiff in error and not the receiver, was entitled to the possession at that time. Having so found, we submit it was the duty of the Court to award us that possession unconditionally, and to disregard the order of the State Court of April 15, 1921.

It is not necessary to comment on the action of the State Court in making an order of this kind, when the owner of the property was not before it, after it had permitted the property to be taken from its possession, and while the Court to which it had granted permission to take the property and to determine the merits of the case was entertaining jurisdiction. But it is well to note that, as the record shows, the case of *Gerlinger v. Hickok* went to trial on March 2, 1921. The record does not show, but it is a fact that will not be disputed, that on March 21, 1921, the trial of that action was com-

pleted, and on that day the trial Judge announced his decision in favor of the defendant Hickok. Between that date and April 20, 1921, when findings were signed, the order of April 15, 1921, attempting to charge a lien against plaintiff in error's property, for the payment of the expenses of the receivership, was made. After the Court had determined that the plaintiff Gerlinger was not entitled to any relief, and after determining that there was no partnership or partnership property, and that the appointment of the receiver was wrongful, and when the property was no longer in its possession, it was a remarkable and wholly unwarranted act to attempt to assess the expenses of the receivership against the property of an innocent party, a stranger to the proceedings. Gerlinger, at whose instance the receiver was appointed, was the party to be made to pay. The receiver was not obliged to defend this replevin action. He was not ordered to defend it, and he did not demand any security for his services in defending it from the person who procured his appointment. Under such circumstances he has himself to blame if he must go without compensation.

This property was in the receiver's possession from May 10, 1920, to June 16, 1920, a period of only thirty-six days. The receiver was allowed $2500 for his services and for the services of his attorney, as the record shows. That allowance was not made until March 2, 1921 (Tr. p. 45). It is fair to assume under these circumstances that the bulk

of the allowance was on account of defending the replevin action. But it will be observed that these were not expenses incurred in the care and preservation of the property and which plaintiff in error would have had to pay independently of the receivership, nor is the order of April 15, 1921, sought to be sustained on this ground.

In *Weston v. Watts,* 45 Hun. 219, it is said:

> "To take a person's property from him by an unauthorized proceeding, and place it in the hands of a receiver, and then subject him to the expenses of the proceeding, would be very transparently unjust, even if the courts had the power to do that. Cases are not uncommon where the result would be ruinous to the injured individual. * * *
>
> "The claim now made in behalf of the receiver has, by no law, been imposed upon the defendant. Neither is there any equitable principle which should require him to pay, before he can secure a return of his property, the expenses of the unlawful proceeding by which it has been taken and withheld from his possession. To require that payment from him or his property would be a wrong which the court has neither the power nor the disposition to inflict upon him. It may be a hardship upon the receiver himself, but it is one of the risks which he has voluntarily assumed. He could have avoided it by declining to accept the appointment or protected himself against the loss of his commissions and expenses by first requiring security from the plaintiffs for their payment. If they cannot now be made to pay, it is more just and equitable that the receiver shall be deprived of his fees and expenses than

it would be to require the defendant to defray the expenses of an unauthorized proceeding, and the cost of depriving him thereby of the possession of his property."

In *Howe v. Jones,* 66 Iowa 156; 23 N. W. 376, the Court says:

"The receiver was appointed on the application of Howe & Co. and was ordered to take charge of the property on their representation that it belonged to Binfords and was subject to be appropriated to the satisfaction of their judgments against Binfords. But it has been determined in the course of the proceedings that it did not belong to Binfords, but that the intervenors were the owners of it, and were entitled to the possession of it, and that no portion of it could be appropriated to the payment of Howe & Co.'s judgment. The possession of the property by the receiver was from the beginning a violation of the intervenors' rights, and every step which has been taken, and every act which has been done, by the receiver with reference to the property, has been done and taken against their protest, and has tended to defeat their rights; and we know of no principle upon which they ought now to be compelled to pay or to contribute in the smallest degree to the payment of the costs incurred in this attempt to deprive them of their property.

"The receiver is entitled, perhaps, to be compensated for his services, and to be reimbursed for his expenses, but for this he must look to the party at whose instance he was appointed. It was said by this Court in the last appeal, it is true, that if the disbursements, etc., were made in good faith, were necessary, and were beneficial to the parties ultimately entitled to the fund, there was no reason why

they should not be paid from the fund. *This would undoubtedly be the true rule if the party entitled to the fund was a party to the proceedings in which the receiver was appointed.* But the intervenors were in no proper sense parties to the receivership. The proceedings were instituted for the purpose of appropriating the property of Binford Bros. to the payment of the judgments which Howe & Co. had obtained against them. *No interest of the intervenors was sought to be subserved by it, nor was it instituted for the establishment of a right as against them. They became parties to it for the purpose of asserting their ownership of the property in the hands of the receiver; and when their right to it was established it ceased to be a fund in the hands of the receiver.* It was then determined that it was not subject to be appropriated to the object to which it was sought by the proceedings to appropriate it, and their right to it, as against the receiver and all the parties to the proceedings, was fully established. Nothing has been done by the receiver for their benefit, and it is not clear by any means that they will receive any advantage from what he has done, and we think it clear that they ought not to be charged with the costs or expenses attending the proceedings."

In *Highley v. Deane,* 168 Ill. 272; 48 N. E. 52, the Supreme Court of Illinois says:

"Where the receivership is procured under the assertion of an unjust and wrongful claim, as finally found by the Court, and the receiver is authorized to take possession of the property of another on such wrongful assertion, the court can protect the injured party by returning the property of which he was divested without its being diminished to pay receiver's charges. * * *

> "And the Courts almost uniformly hold in the case of intervenors that, where the receivership is not requested by them, and they obtain no benefit from it, they or their property are not liable for any of the costs or expenses."

The Supreme Court of California, in the case of *Ephraim v. Pacific Bank,* 129 Cal. 589, speaking of the receiver, says:

> "If he has taken property into his custody under an irregular, unauthorized appointment, he must look for his compensation to the parties at whose instance he was appointed, and the same rule applies if the property of which he takes possession is determined to belong to persons who are not parties to the action, and is taken from his possession by paramount authority. *As to such property his appointment as receiver was unauthorized and conferred upon him no right to charge it with any expenses.*"

II.

THE TRIAL COURT HAD POWER TO AWARD DAMAGES FOR THE DETENTION OF THE PROPERTY.

The second error assigned involves the question of whether in a replevin action where the trial Court finds for the plaintiff, the defendant being a receiver and sued in his representative capacity, damages may be awarded for the detention of the property. The Court below was of the opinion that since the action was against "the mere arm of a court of sister jurisdiction" plaintiff in error was "not entitled to anything in the nature of damages

for the detention", and thereupon refused plaintiff's request for this relief and ordered judgment for the return of the property, but without damages and without costs.

The general rule, which is applicable here, is that unless the property has a usable value interest on the value of the property constitutes the measure of damages.

34 Cyc. 1560-1564.

The value of the property replevined was $100,000. It was so alleged in the complaint, and this allegation was expressly admitted in the receiver's answer.

The receiver seized the property on May 10, 1920 (Tr. p. 35). The property was taken from the receiver on June 16, 1920, as is shown by the Marshal's return (Tr. p. 8). The legal rate of interest in California is 7%.

If, therefore, plaintiff in error was entitled to damages for the detention of the property it was entitled to an amount equal to 7% of the sum of $100,000 for a period of thirty-six days, amounting to $690.40, together with its costs of suit.

The authorities are all to the effect that a judgment against a receiver in his official capacity ordinarily has no greater effect than to establish the existence and amount of the liability, but in these particulars it is conclusive. The time and manner of payment of the judgment are controlled by the

Court appointing the receiver, and are payable only from funds in his hands.

34 Cyc. 445-446.

We know of no authority precluding a Court which has received permission to entertain jurisdiction of a cause against a receiver from giving judgment covering every issue involved. That was all the trial Court was requested to do in this case. Plaintiff in error was entitled to damages for the detention of its property, and this was an incident of the replevin action which the State Court permitted the Federal Court to determine. The judgment could just as properly provide for damages and costs as for the return of the property itself.

The trial Court was not deprived of the power to give such a judgment merely because it lacked the power to enforce such a judgment when given. The judgment might be unenforceable because of lack of funds in the receiver's hands to satisfy it, or other claims against the receiver might take priority over it; but those would be matters to be determined in the State Court after the Federal Court had given its judgment.

The Court below had the power to award the physical possession of the property to plaintiff, and to enforce its judgment to that extent, because those were incidents inseparable from the order of the State Court permitting the possession of the property to be taken in the replevin action. It also had

power to award judgment for damages and costs, as those were incidents inseparable from the determination of a replevin action; but since there was no property, except the property replevined, over which it had jurisdiction, it could not enforce the payment of a judgment for damages and costs. Such part of the judgment could be enforced only by application to the State Court.

The trial Court apparently was of the opinion that because it had no power to enforce such a judgment it had no power to give it. The authorities on the subject are well-settled to the contrary. (See the foregoing citations.)

Another trial of this action is not necessary. Full relief can be accorded by a modification of the judgment, and we respectfully submit that the judgment of the Court below should be modified by ordering the return of the property to plaintiff unconditionally, with damages for its detention in the sum of $690.40, and costs of suit.

Respectfully submitted,

McNair & Stoker,
Attorneys for Plaintiff in Error.